

No. SC85137

**IN THE
MISSOURI SUPREME COURT**

CHESTER JAMES TOLLIVER,

Respondent,

v.

DIRECTOR OF REVENUE, STATE OF MISSOURI

Appellant.

**Appeal from the Taney County Circuit Court
The Honorable Tony W. Williams, Judge**

APPELLANT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

This appeal is from the judgment of the Taney County Circuit Court reinstating the driving privileges of respondent Chester James Tolliver. Pursuant to § 302.311, RSMo. 2000, appeals from the judgment of the circuit court in driver's license cases may be taken as in civil cases. This appeal does not involve any of the categories reserved for the exclusive appellate jurisdiction of this Court. Therefore, jurisdiction originally lay in the Missouri Court of Appeals, Southern District. Mo. Const., Art. V, § 3; § 477.060, RSMo. 2000. This Court, having ordered transfer, has jurisdiction pursuant to Mo. Const., Art. V, § 10.

STATEMENT OF FACTS

On December 16, 2001, at approximately 11:02 p.m., Officer Eaton was dispatched to Hidden Valley #6 in response to “a report of assault and leaving the scene of a traffic accident.” (LF20; *see also* LF 12,19). Wayne Watson, the victim of the apparent assault, told Officer Eaton that he had been beaten by the driver in this case, Tolliver (LF19). Eaton reported, “He also stated that he was drunk” (LF19).

Officer Schmidt soon arrived at the Hidden Valley address to assist Officer Eaton (LF 20). Officer Schmidt took statements from the witnesses present (LF 20). Watson, who had known Tolliver for years, said that Tolliver had come to his trailer twice that evening, and he had admitted Tolliver both times, and that Tolliver was drunk (LF 20). When asked by Officer Schmidt how Watson knew that Tolliver was drunk, Watson stated that he has seen Tolliver drunk and that he has seen Tolliver sober, and that he knew Tolliver was drunk (LF 20). Watson also stated that the second time Tolliver went to Watson’s trailer, Tolliver was yelling, and Watson asked Tolliver to leave, but Tolliver began swinging at Watson and hitting him (LF 20).

Jeremy Mings stated that he was in the trailer at Hidden Valley when Tolliver came in, yelling something, but left after a minute (LF 20). Mings also stated that Tolliver returned later and was mad (LF 20). Mings stated that Tolliver and Watson started to fight, whereupon Mings grabbed a flashlight and told Tolliver to leave (LF 20). Mings saw Tolliver get into his vehicle and pull out of the drive, drive south on the street, turn around where it dead ends and drive back toward the trailer (LF 20). Mings stated that Tolliver then

swerved suddenly into the drive and struck Carol Berry's car (LF 20). Mings said that Tolliver then drove off in his brown or maroon Lincoln (LF 20).

Carol Berry, Tolliver's ex-wife, stated that the first time Tolliver was at the trailer, everything was fine (LF 20). The second time Tolliver came to the trailer, she was in the bedroom, and Tolliver started yelling at her and then began fighting with Watson (LF 20). After Mings grabbed the flashlight and told Tolliver to leave, Tolliver left the trailer and then Berry heard a crash (LF 20). Berry stated that Tolliver was drunk (LF 20). She also stated that she was with him earlier in the day when he started drinking (LF 20).

Officer Schmidt also took the statement of Ruth Marsale, who said that she was standing in the doorway of her house across the street when she heard some noise (LF 20). She observed a man get into a car, drive up the street, turn around, and hit Berry's car (LF 20).

Without waiting for Officer Schmidt to complete his work, Officer Eaton went to Tolliver's house with two Taney County deputies (LF 19). Tolliver was standing on his back porch with a drink in his hand (LF 19). Eaton found Tolliver to have a strong odor of alcoholic beverage, glassy eyes, dilated pupils, slurred speech, and mussed clothing (LF12). Tolliver's attitude was combative and uncooperative, he was using profanity, and his ability to follow instructions was poor (LF 12).

Officer Eaton asked Tolliver what had happened at Hidden Valley; Tolliver initially responded that he did not know what the officer was talking about (LF 19). When Tolliver then started to take a drink, Deputy Kempker told him not to do so (LF 19). Tolliver tried

to take a drink anyway, and Deputy Kempker knocked the glass out of Tolliver's hand (LF 19). Tolliver then became very angry and started yelling at the officers, asking if they had a warrant (LF 19). Officer Eaton informed Tolliver that the officers did not need one, and again asked Tolliver if anything had happened at Hidden Valley (LF 19). The second time, Tolliver responded that it was his vehicle that he had damaged and that the officers could not do anything about it (LF 19). Tolliver also stated that he would say he had been home for about thirty minutes prior to the officers' arrival and that he had several drinks, and that the officers could not prove anything else (LF 19). Officer Eaton then asked Tolliver if he would perform the standardized field sobriety tests (LF 19). Tolliver swore at the officers and claimed, "You cannot prove I was driving" (LF 19). Officer Eaton then placed Tolliver under arrest at 11:30 p.m. for driving while intoxicated, leaving the scene of an accident, and assault (LF 12, 19).

Officer Eaton transported Tolliver to the Branson Police Department to administer a blood alcohol content test (LF 19). Upon arrival at the police department, Officer Eaton read Tolliver the implied consent law, but Tolliver refused the test (LF 14, 19). Officer Eaton finished booking Tolliver and delivered him to the Taney County Jail (LF 19).

On December 16, 2001, the Director revoked Tolliver's driving privileges due to his refusal to submit to the blood alcohol test (LF 11). On December 26, 2001, Tolliver filed a petition for review in the Circuit Court for Taney County (LF 3-4, 8-9). On January 31, 2002, the circuit court took up the case. The prosecutor, for the Department of Revenue, rested on the administrative record, which was admitted into evidence. Tolliver testified

briefly. He said that he was driving and had hit the car being used by his ex-wife with his own (Tr. 4). He also testified about his drinking. The testimony is unclear. It begins with the subject of his drinking before or during the events at Hidden Valley. But that testimony consists of a one-word answer to an ambiguous question:

Q. Okay. Prior–Prior to coming back home had you had anything to drink when you were over at—I guess your ex-wife—had you had anything to drink?

A. No, sir.

(Tr. 4-5). He then expressly denied drinking on the way home (Tr. 5).

Tolliver also testified that had been at home 45 minutes to one hour prior to the officers' arrival (Tr. 5).

Tolliver's attorney argued at the hearing that the arresting officers did not have probable cause to arrest Tolliver (Tr. 2, 6-7). After the argument, the trial court stated, "[T]here's no probable cause for any invasion of his [Tolliver's] privacy at that point to demand any type of testing" (Tr. 7). On February 25, 2002, the trial court entered its Judgment and Order, finding that no probable cause existed for the arrest of Tolliver at the time the arrest was made, and finding for Tolliver and against the Director (LF 25, 29). The Director timely appealed (LF 25-28).

The Court of Appeals, Southern District, reversed the circuit court's decision and upheld the revocation. This court granted transfer.

POINT RELIED ON

The trial court erred in reinstating the driving privileges of Tolliver based on the conclusion that the arresting officer lacked probable cause, because its judgment is against the weight of the evidence showing that the officer had probable cause and is unsupported by substantial evidence in that the officer received a report of an assault and automobile accident, was told by the apparent assault victim at the scene that Tolliver was “drunk,” Tolliver admitted that he had been driving and that he had hit another car, Tolliver appeared and acted intoxicated at the time he was found and arrested, and Tolliver did not at that time deny drinking before or being intoxicated at the time he was driving.

Hinnah v. Director of Revenue, 77 S.W.3d 616 (Mo. banc 2002)

Riche v. Director of Revenue, 987 S.W. 2d 331 (Mo. banc 1999)

Bollinger v. Director of Revenue, 39 S.W.3d 64 (Mo. Ct. App. E.D. 2001)

Hopkins-Barken v. Director of Revenue, 55 S.W.3d 882 (Mo. Ct. App. E.D. 2001)

§ 577.041, RSMo. 2000

ARGUMENT

The trial court erred in reinstating the driving privileges of Tolliver based on the conclusion that the arresting officer lacked probable cause, because its judgment is against the weight of the evidence showing that the officer had probable cause and is unsupported by substantial evidence in that the officer received a report of an assault and automobile accident, was told by the apparent assault victim at the scene that Tolliver was “drunk,” Tolliver admitted that he had been driving and that he had hit another car, Tolliver appeared and acted intoxicated at the time he was found and arrested, and Tolliver did not at that time deny drinking before or being intoxicated at the time he was driving.

A. Standard of Review

The standard of review for this court-tried civil case is set forth in *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976): “[T]he decree or judgment of the trial court will be sustained by the appellate court unless there is no substantial evidence to support it, unless it is against the weight of the evidence, unless it erroneously declares the law, or unless it erroneously applies the law.” See *Hinnah v. Director of Revenue*, 77 S.W.3d 616, 620 (Mo. banc 2002). Where “the evidence is uncontroverted or admitted so that the real issue is a legal one as to the legal effect of the evidence, then there is no need to defer to the trial court’s judgment.” *Id.*

B. The decision to revoke for refusing a test must be upheld if the evidence shows that officer had probable cause to arrest him.

Section 577.041.1, RSMo. 2000, instructs the Director to revoke a license for refusing to take a breath test. The statute then provides for judicial review of the revocation, setting out the questions to be decided by the circuit court:

At the hearing, the court shall determine only: (1) Whether or not the person was arrested . . . ; (2) Whether or not the officer had: (a) Reasonable grounds to believe that the person was driving a motor vehicle while in an intoxicated or drugged condition; . . . and (3) Whether or not the person refused to submit to the test.

§ 577.041.4, RSMo. 2000. *See Hinnah v. Director of Revenue*, 77 S.W.3d at 620.

Here, there was never any issue as to the first and third points. Mr. Tolliver was told at his house that he was under arrest (LF 19), and he was then taken from his house to the police station (LF 19). At the police station he was again told that he was under arrest (LF 19), and was charged with driving while intoxicated, leaving the scene of an accident, and assault (LF 19). At the police station, Officer Eaton read Tolliver the implied consent warning, and Tolliver refused to take a breath test (LF 14, 19). Tolliver never disputed that he was arrested or that he refused to take the blood alcohol test. In fact, when he testified at the hearing, Tolliver confirmed that he demanded the officers get off his property and that he then refused to do anything (Tr. 5-6).

The trial court reversed the Director's revocation solely on the grounds that the officer did not have probable cause to arrest Tolliver for driving while intoxicated (LF 29).

“Probable cause to arrest exists when the arresting officer’s knowledge of the particular facts and circumstances is sufficient to warrant a prudent person’s belief that a suspect has committed an offense.” *State v. Tokar*, 918 S.W. 2d 753, 767 (Mo. banc 1995), quoted with approval, *Hinnah*, 77 S.W. 3d at 621. Probable cause may be based on a variety of information before the officer, including circumstantial evidence and statements from other officers and eye witnesses. *Bollinger v. Director of Revenue*, 39 S.W.3d 64, 65 (Mo. Ct. App. E.D. 2001) (“An officer may have reasonable grounds to arrest for driving while intoxicated, even when the evidence of ‘actually driving’ is based on circumstantial evidence.”); *Hopkins-Barken v. Director of Revenue*, 55 S.W.3d 882, 885 (Mo. Ct. App. E.D. 2001) (“Information given by eyewitnesses to the arresting officer directly, or through other officers, even if hearsay, is admissible to establish probable cause because it is not offered for its truth, but to explain the basis for a belief that probable cause to arrest existed.”).

C. Undisputed evidence before the circuit court showed that the officer had probable cause to arrest Tolliver for driving while intoxicated.

The question, then, is whether the circuit court had sufficient basis for finding that the picture before Officer Eaton at the time he arrested Tolliver was not sufficient to warrant a prudent person to believe that Tolliver had been driving while intoxicated. Because there is no dispute about the facts that formed that picture, there is no need to defer to the trial court’s judgment. *See Hinnah*, 77 S.W. 3d at 620.

Officer Eaton began with a report of an assault and leaving the scene of a motor vehicle accident at Hidden Valley #6 (LF12, 19-20). When he arrived at Hidden Valley, Officer Eaton met Wayne Watson. Watson said that he that Tolliver, whom he knew, had beaten him, and that Tolliver was drunk (LF 12, 19). Those facts were later confirmed in statements given to Officer Eaton's backup, Officer Schmidt (LF20). So even before leaving to see Tolliver, Officer Eaton had information that Tolliver was drunk, and that Tolliver had assaulted Watson, then gotten into his car, and rammed his ex-wife's car.

Officer Eaton then went to Tolliver's house (LF 19). When Officer Eaton arrived, Tolliver was standing on his back porch with a drink in his hand (LF 19). Tolliver had a strong odor of alcoholic beverage, his eyes were glassy, his pupils were dilated, his speech was slurred, his clothing was mussed, his attitude was combative and uncooperative, he was using profanity, and his ability to follow instructions was poor (LF 12). That confirmed that Tolliver was intoxicated. Officer Eaton asked Tolliver what had happened at Hidden Valley; Tolliver responded that he did not know what the officer was talking about (LF 19). The deputies interrupted Tolliver's attempt to drink from the glass he held (LF 19). Tolliver then became very angry and started yelling at the officers, asking if they had a warrant (LF 19). Officer Eaton informed Tolliver that the officers did not need one, and again asked Tolliver if anything had happened at Hidden Valley (LF 19). Tolliver responded that it was his vehicle that he had damaged and that the officers could not do anything about it (LF 19). Tolliver also stated that he would say he had been home for about thirty minutes prior to the officers' arrival and that he had several drinks, and that the officers

could not prove anything else (LF 19). Officer Eaton then asked Tolliver if he would perform the standardized field sobriety tests (LF 19). Tolliver swore at the officers and claimed, “You cannot prove I was driving” (LF 19). Again, Tolliver’s behavior confirmed his intoxication. And it confirmed that Tolliver had been driving, at least at Hidden Valley and returning home.

Only then did Officer Eaton place Tolliver under arrest for driving while intoxicated, leaving the scene of an accident, and assault (LF 12, 19).

Though he testified at the hearing, Tolliver did not contest only of the facts, as they appeared to Officer Eaton. The substantial weight of the evidence – the undisputed evidence of what an eyewitness reported, Tolliver’s behavior and statements, and the officers’ own observations of Tolliver – established that Tolliver was intoxicated when, while driving, he hit his ex-wife’s car. That gave Officer Eaton probable cause to arrest Tolliver. Thus the judgment of the trial court was against the weight of the evidence, was unsupported by substantial evidence, and should be reversed.

D. Neither self-serving, ambiguous statements by an apparently intoxicated person regarding when he drank nor the presence of an alcoholic beverage in his hand was sufficient to eliminate the officer's otherwise undisputed basis for probable cause to believe Tolliver was intoxicated earlier, when he was admittedly driving.

The court transferred this case along with *Swanberg v. Director of Revenue*, No. SC85124, based on parallel applications for transfer filed by the same attorney. Those applications cited concern over allegedly varied holdings among the districts with regard to how the possibility of drinking *after* driving relates to the determination of whether the officer had probable cause under § 577.041. But the evidence of post-driving drinking is an insufficient basis on which to reject the arresting officer's probable cause determination.

At trial, Tolliver claimed that he had been drinking *after* returning home from Hidden Valley #6 (Tr. 4). But that testimony was irrelevant; the issue was what Officer Eaton knew at the time of arrest, not what story Tolliver told later.

There was little evidence that Tolliver had been drinking after returning home: just the presence of a drink in his hand and his statement that he had several drinks during the thirty minutes he had been home (LF 19). But in speaking to the officers at his home, Tolliver did not expressly deny drinking before arriving at Hidden Valley.¹ And Officer

¹ Nor did he do so in his testimony to the circuit court. The closest he came were denials in response to questions whether he drank at or on the way home from Hidden

Eaton was not required to accept Tolliver's implied claim that he had only been drinking since returning home, in light of evidence that he was intoxicated earlier. See *Kinsman v. Director of Revenue*, 58 S.W.3d 27, 33-34 (Mo. Ct. App., W.D. 2001) ("Officers are usually not highly impressed with bare denials in the midst of factual circumstances strongly indicating a proposition is true").

What Tolliver wants is a rule that says: If you are driving while intoxicated and are not immediately apprehended, you can avoid revocation merely by grabbing a drink and claiming to have been drinking during the interim. Such a rule cannot be reconciled with the purpose of the revocation law: "to protect the public by quickly removing drunken drivers from Missouri's roads and highways," *Riche v. Director of Revenue*, 987 S.W. 2d 331, 335 (Mo. banc 1999).

Valley #6 (Tr. 4-5). He was not asked, nor did he volunteer, whether he had been drinking before reaching Hidden Valley, as his ex-wife told Officer Schmidt (*see* LF 20).

CONCLUSION

For the reasons state above, the decision of the circuit court should be reversed, and the decision of the Director should be reinstated.

Respectfully submitted,

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Certificate of Service

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Certification of Compliance

The undersigned hereby certifies that the foregoing brief complies with the limitations contained in Rule 84.06(b), and that the brief contains 3,416 words.

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